

1 Arthur A. Hartinger (SBN: 121521)
ahartinger@meyersnave.com
2 Linda M. Ross (SBN: 133874)
lross@meyersnave.com
3 Jennifer L. Nock (SBN: 160663)
jnock@meyersnave.com
4 Michael C. Hughes (SBN: 215694)
mhughes@meyersnave.com
5 MEYERS, NAVE, RIBACK, SILVER & WILSON
555 12th Street, Suite 1500
6 Oakland, California 94607
Telephone: (510) 808-2000
7 Facsimile: (510) 444-1108

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8 Attorneys for Defendants and Respondents
City of San Jose
9

10 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

11 **COUNTY OF SANTA CLARA**

12 SAN JOSE POLICE OFFICERS'
ASSOCIATION,

13 Plaintiff,

14 v.

15 CITY OF SAN JOSE, BOARD OF
16 ADMINISTRATION FOR POLICE AND
FIRE RETIREMENT PLAN OF CITY OF
17 SAN JOSE, and DOES 1-10 inclusive.

18 Defendants,
19
20
21

Case No. 1-12-CV-225926

[Consolidated with Case Nos. 112CV225928,
112CV226570, 112CV226574, 112CV227864]

Assigned for all purposes to the Honorable Patricia
M. Lucas

**DEFENDANT'S MEMORANDUM OF POINTS
AND AUTHORITIES IN SUPPORT OF
MOTION FOR JUDGMENT ON THE
PLEADINGS**

Date: January 29, 2013
Time: 9:00 a.m.
Courtroom: 2

Complaint Filed: June 6, 2012
Trial Date: None Set

22 **AND RELATED CROSS-COMPLAINT**
23 **AND CONSOLIDATED ACTIONS**
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1 **I. INTRODUCTION**

2 On June 5, 2012, the voters of San Jose enacted Measure B, a pension reform measure that
3 amended the retirement sections of the San Jose City Charter. Individuals and employee
4 organizations, including the American Federation of State, County, and Municipal Employees,
5 Local 101 ("AFSCME"), and the San Jose Police Officers Association ("SJPOA"), brought five
6 lawsuits challenging Measure B, which this Court has ordered consolidated for pretrial purposes.
7 The City of San Jose ("City") brings the instant motion for judgment on the pleadings pursuant to
8 Code of Civil Procedure section 438 to eliminate those claims that, based on the pleadings, do not
9 state a cause of action against the City or City Manager Debra Figone.

10 All of the consolidated complaints share core constitutional and contractual claims that the
11 City will address substantively in motions for summary adjudication or summary judgment. But
12 the complaints also contain peripheral claims that have no logical relation to Measure B and should
13 be dismissed through the instant motion. The AFSCME and SJPOA complaints include causes of
14 action for "Unconstitutional Bill of Attainder," "Violation of the Constitutional Right to Petition,"
15 "Illegal Ultra Vires Tax, Fee or Assessment," and violation of California's hate crimes statute.
16 These constitutional and statutory causes of action are all facially meritless and should be
17 dismissed.

18 In addition, the complaints raise claims that are not ripe for adjudication, including violation
19 of the Pension Protection Act and violation of the Separation of Powers doctrine. In a separate
20 motion, set for hearing on January 17, 2013, the City has challenged by demurrer these and other
21 claims brought by the San Jose Retired Employees Association in Case No. 112-CV-233660, also
22 on ripeness grounds.

23 The City respectfully requests that the Court dismiss with prejudice each of the causes of
24 action addressed in this motion.

25 **II. STATEMENT OF FACTS**

26 On June 5, 2012, San Jose city voters enacted Measure B, entitled, "The Sustainable
27 Retirement Benefits and Compensation Act." (AFSCME Complaint, ¶ 12; City's Request For
28 Judicial Notice in Support of Defendants' Motion for Judgment on the Pleadings ("RJN"), Exh. A.)

1 The measure's "Findings" state, among other things, that the "City's ability to provide its
2 citizens with Essential City Services has been and continues to be threatened by budget cuts caused
3 mainly by the climbing costs of employee benefit programs, and exacerbated by the economic
4 crisis." They further state: "By this Act, the voters find and declare that post employment benefits
5 must be adjusted in a manner that protects the City's viability and public safety, at the same time
6 allowing for the continuation of fair post - employment benefits for its workers...." (RJN, Exh. 1, §
7 1501-A.) The Act itself must be construed in its entirety, but below are provisions of Measure B
8 that are specifically at issue in this motion:

9 In connection with employee pension contribution rates, Measure B provides:

10 "Unless they voluntarily opt in to the Voluntary Election Program ...,
11 Current Employees shall have their compensation adjusted through
12 additional retirement contributions in increments of 4% of
13 pensionable pay per year, up to a maximum of 16%, but no more
14 than 50% of the costs to amortize any pension unfunded liabilities,
except for any pension unfunded liabilities that may exist due to Tier
2 benefits in the future.... ." (*Id.*, § 1506-A(b).)

15 If a court determines Section 1506-A(b) is invalid, then Measure B has the following
16 "Savings" clause:

17 "In the event Section 6(b) is determined to be illegal, invalid or
18 unenforceable as to Current Employees (using the definition in
19 Section 6(a)), then, to the maximum extent permitted by law, an
20 equivalent amount of savings shall be obtained through pay
reductions. Any pay reductions implemented pursuant to this section
shall not exceed 4% of compensation each year, capped at a
maximum of 16% of pay." (*Id.*, § 1514-A.)

21 In addition, if a court determines that any portion of Measure B is invalid, then Measure B
22 has the following "Severability" clause which states in part:

23 "(b) If any ordinance adopted pursuant to the Act is held to be
24 invalid, unconstitutional or otherwise unenforceable by a final
25 judgment, the matter shall be referred to the City Council for
26 determination as to whether to amend the ordinance consistent with
the judgment, or whether to determine the section severable and
ineffective." (*Id.*, § 1515-A.)

27 Finally, Measure B includes an "Actuarial Soundness" clause, which provides in part:
28

1 “(c) In setting the actuarial assumptions for the plans, valuing the
2 liability of the plans, and determining the contributions required to
3 fund the plans, the objectives of the City’s retirement boards shall be
4 to: . . .

5 (ii) ensure fair and equitable treatment for current and future plan
6 members and taxpayers with respect to the costs of the plans, and
7 minimize any intergenerational transfer of costs....” (*Id.*, § 1513-A.)

8 III. ARGUMENT

9 After a defendant has filed its answer and the time to demur to the complaint has expired,
10 the defendant may bring a motion for judgment on the pleadings on the ground that the complaint,
11 or any of the causes of action stated in the complaint, “does not state facts sufficient to constitute a
12 cause of action against that defendant.” Cal. Civ. Proc. Code §§ 438(c)(1)(B)(ii), 438(c)(2)(A),
13 438(f)(2). The grounds for the motion “shall appear on the face of the challenged pleading or from
14 any matter of which the court” takes judicial notice. Cal. Civ. Proc. Code § 438(d). Here, the City
15 requests judicial notice of and relies on the text of Measure B, which is quoted throughout
16 plaintiffs’ complaints, as well as San Jose City Ordinance No 29174, enacted by the City Council
17 on December 4, 2012, which implements certain sections of Measure B. (RJN, Exhs. A, B.)

18 A. AFSCME Cannot State A Claim For Unlawful Bill Of Attainder

19 AFSCME cannot state a claim for unlawful bill of attainder because, as a matter of law,
20 Measure B does not “punish” City employees under any of the tests articulated by the courts.

21 In its second cause of action, AFSCME alleges that Measure B constitutes an Unlawful Bill
22 of Attainder, because it “exclusively targets and penalizes” City employees for “harsher treatment”
23 than other City residents “by imposing an excise on them” of up to 16% of salary unless they
24 forego their rights to receive their full pension benefits. (*Id.*, ¶¶ 125, 126.) AFSCME also alleges
25 that Measure B punishes City employees by “imposing on them a ‘poison pill’ provision” that
26 reduces salaries if they successfully challenge the constitutionality of Measure B. (*Id.*, ¶ 128.)
27 Finally, AFSCME asserts that Measure B is a bill of attainder because “it shifts the burden of
28 financing public debt upon a small class of private parties.” (*Id.*, ¶ 16(c).) No legal authority,
29 however, supports AFSCME’s claim. Measure B does not qualify as a Bill of Attainder under any
30 of the legal standards articulated by the courts.

1 AFSCME brings this cause of action under Article I, Section 9 of the California
2 Constitution, which provides, "A bill of attainder ... may not be passed." In interpreting this
3 prohibition on bills of attainder, California courts rely on precedent interpreting its federal
4 counterpart. *See, e.g., California State Employees' Assn. v. Flourney*, 32 Cal. App. 3d 219, 224-
5 229 (1973) (using same analysis for claims brought under both Cal. Const. Cal. Const., art. I, § 9
6 and U.S. Const., art. I, § 10 ["No state shall ... pass any bill of attainder...."].) A bill of attainder "is
7 a legislative act which, without a judicial hearing, designates a punishment upon a person or
8 specified class." *Sagaser v. McCarthy*, 176 Cal. App. 3d 288, 305 (1986), citing *Flourney*, 32 Cal.
9 App. 3d at 224-225.

10 Every legislative burden imposed on an ascertainable group does not constitute a bill of
11 attainder. "Forbidden legislative punishment is not involved merely because the Act imposes
12 burdensome consequences." *Sagaser*, 176 Cal. App. 3d at 306, quoting *Nixon v. Adm'r of General*
13 *Servs.*, 433 U.S. 425, 472 (1977). As the United States Supreme Court explained:

14 "By arguing that an individual or defined group is attained whenever
15 he or it is compelled to bear burdens which the individual or group
16 dislikes, appellant removes the anchor that ties the bill of attainder
17 guarantee to realistic conceptions of classification and punishment.
18 His view would cripple the very process of legislating, for any
19 individual or group that is made the subject of adverse legislation
20 can complain that the lawmakers could and should have defined the
21 relevant affected class at a greater level of generality. . . . In short,
22 while the Bill of Attainder Clause serves as an important 'bulwark
23 against tyranny,' (citation omitted), it does not do so by limiting
24 Congress to the choice of legislating for the universe, or legislating
25 only benefits, or not legislating at all."

26 *Nixon*, 433 U.S. at 470-471, quoting *United States v. Brown*, 381 U.S. 437, 443 (1965).

27 To determine "whether particular legislation constitutes a bill of attainder, courts have
28 applied three different tests." *Legislature of the State of California v. Eu*, 54 Cal. 3d 492, 526
(1991), citing *Nixon*, 433 U.S. at 472. These are 1) "an 'historical' test" that "has been used to
determine whether the subject legislation imposes a kind of punishment traditionally deemed
prohibited" as unconstitutional bills of attainder; 2) "a 'functional test of the existence of
punishment, analyzing whether the law under challenge, viewed in terms of the type and severity of

1 burdens imposed, reasonably can be said to further nonpunitive legislative purposes;” and 3) “a
2 ‘motivational’ test, ‘inquiring whether the legislative record evinces’” a legislative “‘intent to
3 punish.” *Id.*, quoting *Nixon*, 433 U.S. at 475-476, 478; *Sagaser*, 176 Cal. App. 3d at 306. Here,
4 none of these tests is met.

5 First, historically, no legislation similar to Measure B has ever been deemed an unlawful
6 bill of attainder. In *Alpha Standard Investment v. County of Los Angeles*, for example, the court
7 quickly found the historical test had not been met where the rent control legislation at issue had
8 “nothing like the traditional death, imprisonment, banishment, or property seizure consequence of
9 prior action...” *Alpha Standard Investment Co.*, 118 Cal. App. 3d 185, 190 (1981). Applying the
10 “historical test” to pension and employment legislation, California courts have declined to find the
11 legislation at issue to be a prohibited bill of attainder. *Eu*, 54 Cal. 3d at 525-526; *Flournoy*, 32 Cal.
12 App. 3d at 224-229. After surveying cases of attainder, the California Supreme Court held that
13 Proposition 140, which imposed “legislative term, budgetary, and pension limitations” on “all
14 current and future incumbent legislators,” but which targeted Assemblyman Willie Brown and
15 Senator David Roberti, did *not* violate the prohibition on bills of attainder. *Eu*, 54 Cal. 3d at 525-
16 526. In *Flournoy*, the Court held that “the legislative failure to appropriate funds for salary
17 increases of public employees” did not “constitute ‘punishment’ within the meaning of the anti-
18 attainder provisions of the federal and state constitutions.” *Flournoy*, 32 Cal. App. 3d at 224-229.
19 Thus, under all relevant precedent, AFSCME’s allegations of punishment, which amount to a
20 decrease in compensation for public employees, do not come within the historical meaning of
21 attainder.

22 Second, in finding “the functional test” not met, the *Eu* court looked to the language of the
23 “measure itself,” and found that it “expresses broad, nonpunitive purposes, namely, ‘[t]o restore a
24 free and democratic system of fair elections, and to encourage qualified candidates to seek public
25 office’ by limiting ‘the powers of incumbency.’” *Eu*, 54 Cal. 3d at 526, quoting Cal. Const., art.
26 IV, § 1.5. The Court dismissed the petitioners’ contention that the measure’s “declarations of
27 intent” were “‘self-serving,’” and held, “we have no reason to dispute the accuracy of their
28 description of the measure’s primary intent.” *Id.*, citing *Nixon*, 433 U.S. at 477; *see, also Tobe*, 9

1 Cal. 4th at 1095 (where “[t]he declared purpose of the ordinance did not suggest that it was to be
2 enforced solely against the homeless,” court could not assume that ordinance was intended “to
3 drive the homeless out of Santa Ana”). Similarly, here, Measure B’s declared legislative intent also
4 “expresses broad nonpunitive purposes,” in that, Measure B states it “is intended to ensure the City
5 can provide reasonable and sustainable post employment benefits while at the same time delivering
6 Essential City Services to the residents of San Jose.” (RJN, Exh. A, § 1502-A.) *Eu*, 54 Cal. 3d at
7 526; see, also *Sagaser*, 176 Cal. App. 3d at 306 (“if a legitimate legislative purpose is found, the
8 legislative purpose is not punishment”). AFSCME clearly cannot meet this second test.

9 Under the third and final test, the “motivational test,” the *Eu* court looked to whether the
10 legislation or ballot arguments contained any “indication of an intent to *punish* those individuals for
11 any particular past misconduct.” *Eu*, 54 Cal. 3d at 527 (emphasis in original). In doing so, the
12 Court discounted the petitioners’ focus on the “framers’ express intent to dislodge such long-term
13 incumbents as Brown and Roberti,” by explaining that “[b]road reform measures are frequently
14 prompted by particular acts or circumstances involving specific individuals, but in our view such
15 measures would not constitute improper bills of attainder unless an intent to *punish* such
16 individuals clearly appears from their face, or from the circumstances surrounding their passage.”
17 *Eu*, 54 Cal. 3d at 526-527 (emphasis in original). The Court held that although Proposition 140
18 sought to limit Brown and Roberti’s terms, it was not an unconstitutional bill of attainder because
19 there was “no evidence of an intent to single out and *punish* those individuals for any supposed
20 misconduct on their part.” *Id.*, at 527 (emphasis in original). Likewise, here, there is no factual
21 allegation or evidence that Measure B intends to single out anyone for punishment for any alleged
22 misconduct. *Id.*

23 Plaintiffs allegations cannot meet any of the three tests articulated by the courts to
24 determine if a legislative action is a bill of attainder. For these reasons, this Court should dismiss
25 AFSCME’s second cause of action.

26 ///

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28 ///

1 **B. AFSCME and the SJPOA Cannot State a Claim For Violation of The Right To**
2 **Petition**

3 Plaintiffs cannot state a claim that Measure B violates their right to petition the courts,
4 because Measure B involves employee benefits, which are matter of private not public concern,
5 does not directly burden access to the courts and serves important government interests.

6 Plaintiffs AFSCME and SJPOA both allege that Section 1514-A of Measure B violates
7 Article I, Sections 2 and 3 of the California Constitution by penalizing them for bringing “a
8 meritorious and successful lawsuit” challenging Section 1506-A(b). (SJPOA Complaint, ¶¶ 89-92
9 [Fourth Cause]; AFSCME Complaint, ¶¶ 158-165 [Sixth Cause].) The alleged penalty is pay
10 reductions “to the maximum extent permitted by law,” not to “exceed 4% of compensation each
11 year,” and “capped at a maximum of 16% of pay.” (RJN, Exh. A, § 1514-A.) The SJPOA also
12 alleges that Section 1515-A “discourages employees from exercising their fundamental rights to
13 petition the courts because, regardless of any successful court judgment, the City Council usurps
14 the judiciary’s role to decide the remedy, i.e., amendment or severability.” (SJPOA Complaint, ¶
15 93.)

16 Plaintiffs’ claimed violation of the right to “petition the courts” asserts a violation of Article
17 I, Section 3 of the California Constitution’s “right to ... petition government for redress of
18 grievances” rather than Article I, Section 2’s freedom of speech provisions. (See, SJPOA
19 Complaint, ¶ 93.) These two claims, however, are evaluated under the same legal framework.
20 Both state and federal courts have held that the “tests used to evaluate the constitutionality of a law
21 restricting the right to petition are drawn from the free speech cases.” *Vargas v. City of Salinas*,
22 200 Cal. App. 4th 1331, 1342 (2011) (evaluating claims under both U.S. Const., 1st Amend. and
23 Cal. Const., art. I, § 3); *Borough of Duryea v. Guarnieri*, 564 U.S. ___, 131 S. Ct. 2488, 2494-
24 2495, 2500-2501 (2011).

25 First, given that AFSCME and the SJPOA’s claims involve employment benefits for
26 plaintiffs’ members, their claims may be considered “a matter of purely private concern, [where]
27 the employee’s First Amendment interest must give way, as it does in speech cases.” *Borough of*
28 *Duryea*, 131 S. Ct. at 2500. In *Duryea*, the Supreme Court explained, “The right of a public

1 employee under the Petition Clause is a right to participate as a citizen, through petitioning activity,
2 in the democratic process. It is not a right to transform everyday employment disputes into matters
3 for constitutional litigation in the federal courts." *Id.* at 2501. Here, the instant challenges to
4 Measure B are made on behalf of employees against their employer and pertain only to their own
5 employment benefits, rather than to any public concern related to City government. *See, Connick*
6 *v. Myers*, 461 U.S. 138, 144-146 (1983) (providing examples of public employee speech relating to
7 matters of public concern).¹

8 Second, even if the pending union lawsuits are considered matters of public concern, there
9 is nothing in the text of Measure B that directly limits anyone's right to petition for redress of
10 grievances. Under these circumstances, the legal inquiry becomes whether any incidental
11 limitation on expression "furthers an important or substantial governmental interest." *Vargas*,
12 200 Cal. App. 4th at 1346, 1350, quoting *United States v. O'Brien*, 391 U.S. 367, 377 (1968)
13 (upholding statute permitting government to recover attorneys fees where any incidental chilling of
14 legitimate petitioning activity was outweighed by "the significant governmental interests the statute
15 is designed to protect"). Here, Section 1514-A is simply a "Savings" clause, as its caption states, to
16 provide an alternative means for achieving savings for Essential City Services if the first choice for
17 achieving those savings turns out to "be illegal, invalid or unenforceable." (RJN, Exh. A, § 1514-
18 A.) The governmental interest, expressed in Measure B's "Findings" section is not to suppress free
19 expression or the right to petition, but to avoid "endanger[ing] the health, safety and well-being of
20 the residents of San Jose" through "continued and projected reductions in service levels" and to
21 avoid placing the "City's employment programs ... at an imminent risk" due to both "the climbing
22 costs of employee benefit programs" and "the economic crisis." (*Id.*, § 1501-A.)
23 Plaintiffs cannot allege that the City and its voters violated either the speech or petition clauses of
24 the California Constitution.

25 ///

26 ¹ *Connick* cited *Pickering v. Board of Education*, 391 U.S. 563, 571-572 (1968) (teacher
27 criticism of "allocation of school funds between athletics and education" and of school board's
28 methods of asking taxpayers for more money), *Perry v. Sindermann*, 408 U.S. 593 (1972) (teacher
involved "in public disagreement over whether the college should be elevated to 4-year status.

1 **C. AFSCME Cannot State a Claim for an Illegal Tax, Fee or Assessment**

2 AFSCME cannot state a claim under its seventh cause of action, because Measure B was
3 enacted under the City's plenary authority over employee compensation, is not a tax and does not
4 violate equal protection.

5 In its seventh cause of action AFSCME claims that Measure B violates the equal protection
6 clause of Article I, section 7 of the California Constitution by imposing an "excise on City
7 employee wages" to raise funds for "already-incurred liabilities of future retirees and the benefits
8 provided to current retirees" associated with the City's pension system and retiree healthcare plan.
9 (AFSCME Complaint, ¶¶ 166-171.) AFSCME contends that this "excise" violates California's
10 equal protection clause because it "select[s] one particular class of persons for a species of taxation
11 without rational basis." (*Id.*, ¶¶ 172-174). Measure B is not a tax, nor is it without a rational basis.

12 First, neither a decrease in employee compensation, nor an increase in employee pension
13 contributions, comes within the local tax definitions of the California Constitution (Art. XIII-C, §
14 1(a), related to real property, through Art. XIII-D), California's Revenue and Taxation Code, the
15 City of San Jose's Charter, or the City's Municipal Code. Rather, the California Constitution, San
16 Jose City Charter, and San Jose Municipal Code grant the City authority over employee
17 compensation and employee pension contributions that are in no way related to taxation.² Indeed,
18 if changes in employee compensation were treated as a tax, then the City Council's plenary
19 authority to set employee compensation would conceivably be subject to voter approval under the
20 tax provisions of the "Right to Vote on Taxes Act" of Article XIII C, section 2 of the California
21 Constitution. This would be an absurd result, contrary to the above-referenced provisions as well
22 as years of case law that grants charter cities plenary authority over employee compensation. *See*,

23
24 ² *See, e.g.*, Cal. Const., art. XI, Sections 5(b)(4) (granting "plenary authority" to Charter cities to
25 determine City employee compensation); San Jose Charter, art. IX, § 902 ("compensation of all
26 City appointive officers and employees, except as otherwise provided in this Charter, shall be fixed
27 by the Council"); San Jose Charter, art. XV (retirement); San Jose Muni. Code, §§ 3.12.010 ("The
28 council may, by resolution, adopt such regulations to afford compensation to officers and
employees of the city, by way of salary and other benefits, as the council may deem reasonably
necessary"); § 3.28.200 *et seq.*, 3.28.700 *et seq.*, 3.36.1520 *et seq.* (pension contributions); 3.28.385
(retiree medical contributions).

1 e.g., *Sonoma County Organization of Public Employees v. County of Sonoma*, 23 Cal. 3d 296, 317
2 (1979) (“salaries of local employees of a charter city constitutes municipal affairs”)

3 Second, even if Measure B were deemed a tax for purposes of this motion only, AFSCME
4 would still fail to state a claim because it cannot meet its high burden to prove that the alleged tax
5 lacks any rational basis. *Jensen v. Franchise Tax Board*, 178 Cal. App. 4th 426, 435-436 (2009)
6 (in an equal protection tax case, the “burden of demonstrating the invalidity of a challenged
7 classification ‘rests squarely upon the party who assails it’”), quoting *D’Amico v. Board of Medical*
8 *Examiners*, 11 Cal. 3d 1, 17 (1974). “In a rational basis analysis, any conceivable state purpose or
9 policy may be considered by the courts.” *Id.* The City “has no obligation to produce evidence to
10 sustain the rationality of a statutory classification,’ which ‘may be based on rational speculation
11 unsupported by evidence or empirical data.” *Id.*, quoting *Heller v. Doe*, 509 U.S. 312, 320, 113 S.
12 Ct. 2637, 125 L. Ed. 2d 257 (1993). Here, the purpose of Measure B, as stated in its Findings and
13 Intent, is to bring down employee costs so that the City may provide City services to its residents
14 and taxpayers while at the same time preserving reasonable long-term post-employment benefits.
15 Even assuming that Measure B is a tax (which it is not), this is not a purpose prohibited by the
16 equal protection clause.

17 Moreover, in the area of taxation, “‘inequalities which result from a singling out of one
18 particular class for taxation or exemption, infringe no constitutional limitation.’” *Jensen*, 178 Cal.
19 App. 4th at 437, quoting *Carmichael v. Southern Coal Co.*, 301 U.S. 495, 509, 81 L. Ed. 1245, 57
20 S. Ct. 868 (1937). “‘Nothing is more familiar in taxation than the imposition of a tax upon a class
21 or upon individuals who enjoy no direct benefit from its expenditure, and who are not responsible
22 for the condition to be remedied.’” *Id.*, quoting *Carmichael*, 301 U.S. at 521-522; *Silicon Valley*
23 *Taxpayers’ Assn., Inc. v. Santa Clara County Open Space Authority*, 44 Cal. 4th 431, 442 (2008)
24 (same). This is exactly what AFSCME has alleged, i.e., Measure B “imposes on current and future
25 employees the obligation to Fund the city’s general obligation for the unfunded liabilities
26 associated with its pension System and Retiree Healthcare Plan” for future and “current retirees”
27 instead of “impos[ing] on employees the cost of their own, incurred benefits...” (AFSCME

28 ///

1 Complaint, ¶¶ 167, 169, 171, 174.) Even if the Court assumes that Measure B is a tax, AFSCME
2 has not stated a claim for relief under the equal protection clause as applied to a tax.

3 **D. AFSCME and SJPOA Cannot State A Claim For Violation Of The Bane Act**

4 Plaintiffs do not state a claim for violation of the Bane Act, Civil Code 52.1, because they
5 do not have standing and cannot plead the required “threats, intimidation or coercion.”

6 All of AFSCME’s and the SJPOA’s constitutional causes of action (AFSCME’s first seven
7 causes of action and SJPOA’s first through fifth and eighth causes of action), assert a violation of
8 California Civil Code section 52.1 (“Section 52.1” or “Bane Act”). Both plaintiff associations
9 contend that “Civil Code section 52.1 creates a private right of action to seek redress in the
10 Superior Court for violation of constitutional rights.” (SJPOA Complaint, ¶ 73, n. 3; *see*, AFSCME
11 Complaint, page 17, n. 3.) Plaintiffs, however, cannot use Section 52.1 to support or seek damages
12 for their constitutional claims.³

13 Preliminarily, AFSCME and the SJPOA do not have standing to bring a Section 52.1 claim,
14 given the terms of Section 52.1(b), which permits “any individual” to bring a suit “in his or her
15 own name and on his or her own behalf.” *Bay Area Rapid Transit Dist. v. Superior Court*, 38 Cal.
16 App. 4th 141, 142, 144, 44 Cal. Rptr. 2d 887 (1995) (denied standing to parents of deceased hate-
17 crime victim because Section 52.1 “clearly provides for a *personal* cause of action for the victim of
18 a hate crime” and “is limited to plaintiffs who themselves have been the subject of violence or
19 threats”) (emphasis in original). The lack of standing is fatal to the unions’ claims.

20 Even if the unions did have standing, Section 52.1 has never been held to be a vehicle for
21 seeking “redress” in the courts for violation of constitutional provisions. The California Supreme
22 Court has established a “framework for determining the existence of a damages action to remedy an
23 asserted constitutional violation,” but that framework has never included Section 52.1. *See*
24 *Katzberg v. Regents of University of California*, 29 Cal. 4th 300, 307, 317 (2002) (employing

25
26 ³ Because plaintiffs have failed to allege violation of the primary right encompassed by Section
27 52.1, which is to be free from threats, intimidation, or coercion in exercising constitutional rights,
28 plaintiffs’ Section 52.1 claims are appropriately addressed in the instant motion under California’s
primary rights theory. *Coachella Valley Unified School Dist. v. California*, 176 Cal. App. 4th 93,
125-126 (2009) (“the invasion of one primary right gives rise to but a single cause of action”).

1 framework to conclude that an action for damages was not available for violation of the due
2 process provisions of article I, section 7(a) of the California Constitution).⁴

3 Moreover, an alleged constitutional violation – by itself – does not state a claim under
4 Section 52.1. *Shoyoye v. County of Los Angeles*, 203 Cal. App. 4th 947, 950 (2012). Rather, to
5 seek relief under that statute, plaintiffs must allege “threats, intimidation or coercion,” where the
6 “act of interference with a constitutional right must itself be deliberate or spiteful.” *Id.* at 950, 959.
7 “The statute requires a showing of coercion independent” from any coercion that may be inherent
8 in the alleged constitutional violation itself. *Id.* at 959, 961 (statute not violated in wrongful
9 detention case, where detention was result of negligence rather than an intentional interference with
10 constitutional rights). The *Shoyoye* court noted that the legislative history of the amendments to the
11 bill that added monetary damages included comments that, ““Civil Code § 52.1 focuses specifically
12 on the additional element present especially in hate violence, viz., putting persons in fear of their
13 safety.”” *Id.* at 959, quoting Dept. of Justice, Analysis of Assem. Bill No. 2683 (1989-1990 Reg.
14 Sess.) Mar. 1, 1990, p. 2.

15 Here, there is no allegation that the City or its voters, through Measure B, have put
16 AFSCME or SJPOA or its members in fear for their safety or intended, spitefully or deliberately, to
17 violate any of their constitutional rights. Indeed, given that plaintiffs merely use Section 52.1 as
18 their vehicle to sue under various constitutional provisions, they do not even purport to allege the
19 requisite threat, intimidation, or coercion element of the statute. (SJPOA Complaint, ¶ 73, n. 3; *see*,
20 AFSCME Complaint, page 17, n. 3.) Nor would they be able to do so if given leave to amend, as
21 nothing in Measure B is the sort of “egregious conduct” Section 52.1 is meant to address. *See, City*
22 *and County of San Francisco v. Ballard*, 136 Cal. App. 4th 381, 408 (2006) (where plaintiff alleged
23 City coerced him by threatening to impose \$15 million in penalties and “partial demolition” of his
24

25 ⁴ *See, also MHC Financing Limited Partnership Two v. City of Santee*, 182 Cal. App. 4th 1169,
26 1184-1188 (2010) (applying *Katzberg* to find, “money damages is not an appropriate remedy for a
27 violation of the right to petition set forth in article I, section 3(a)”); *Aaron v. Aguirre* (Case No. 06-
28 CV-1451-H(POR)) 2006 U.S. Dist. LEXIS 90384, ** 51-53 (S.D. Cal. 2006) (applying *Katzberg* to
dismiss claims for money damages under Cal. Const., art. I, § 9 (Contracts Clause), and art. 16, §
17 (the Pension Protection Act of 1992) and others).

1 building if he did not perform "unrequired construction," court found he had "not alleged and the
2 record does not establish any conduct that rises to the level of a threat of violence or coercion"
3 under Section 52.1)

4 Because plaintiffs have not and cannot state a claim for relief under Section 52.1, it may not
5 be used to support the specific constitutional claims addressed in this motion. In addition, the
6 Court should dismiss the section 52.1 allegations from Plaintiffs' remaining constitutional claims
7 because they constitute but one cause of action under the primary rights theory. *Coachella Valley*,
8 176 Cal. App. 4th at 125-126. Or, in the alternative, the Court should exercise its discretion to
9 strike reference to Section 52.1 from AFSCME and SJPOA's respective complaints. Cal. Civ.
10 Proc. Code, § 436(a) ("The court may ... at any time in its discretion, and upon terms it deems
11 proper: (a) Strike out any irrelevant, false, or improper matter inserted in any pleading").

12 **E. AFSCME And SJPOA Cannot State a Claim for Violation of the Pension**
13 **Protection Act or Separation of Powers Because Those Claims are Not Ripe for**
Adjudication

14 Plaintiffs cannot state a claim for violation of the Pension Protection Act or Separate of
15 Powers because their claims involve hypothetical scenarios that are not ripe for adjudication.

16 "A court may not issue rulings on matters that are not ripe for review," nor may it issue
17 advisory opinions. *San Bernardino Public Employees Assn. v. City of Fontana*, 67 Cal. App. 4th
18 1215, 1226-1227 (1998) (citations omitted). In making a facial challenge to the constitutionality of
19 an ordinance, plaintiffs "cannot prevail by suggesting that in some future hypothetical situation
20 constitutional problems may possibly arise as to the particular application of the statute Rather,
21 petitioners must demonstrate that the act's provisions inevitably pose a present total and fatal
22 conflict with applicable constitutional prohibitions." *Tobe v. City of Santa Ana*, 9 Cal. 4th 1069,
23 1084 (1995), quoting *Arcadia Unified School Dist. v. State Dept. of Education*, 2 Cal. 4th 251, 267
24 (1992).

25 **1. Pension Protection Act**

26 AFSCME and the SJPOA, in their fifth and eighth causes of action, respectively, assert that
27 Measure B's "Actuarial Soundness" provision conflicts with the California Pension Protection Act
28 (the "Act"), Article XVI, section 17 of the California Constitution. (AFSCME Complaint, ¶¶ 154-

1 156, citing § 1513-A(a); SJPOA Complaint, ¶¶ 107-109.) Plaintiffs contend that Measure B
2 conflicts with the constitutional provisions that provide the retirement board with “plenary
3 authority ... for investment of moneys and administration of the system” and require members of
4 the retirement board to “discharge their duties with respect to the system solely in the interest of,
5 and for the exclusive purposes of providing benefits to, participants and their beneficiaries,
6 minimizing employer contributions thereto, and defraying reasonable expenses of administering the
7 system” while emphasizing that a “retirement board’s duty to its participants and their beneficiaries
8 shall take precedence over any other duty.” (AFSCME Complaint, ¶¶ 147, 153.)

9 This claim is not ripe, however, because there is no allegation that the City’s retirement
10 boards have applied Section 1513-A, and there is no indication that they would do so in violation of
11 the Act. *See, PG&E Corp. v. Public Utilities Com.*, 118 Cal. App. 4th 1174, 1217 (2009) (where
12 agency had not yet applied challenged interpretation, “the dispute petitioners would like this court
13 to resolve is abstract”). Instead, the City has enacted an ordinance requiring that Section 1513-A
14 be applied consistently with the Act. (RJN, Exh. B at pp. 1, 8.) Yet even without this ordinance, it
15 is possible to reconcile Section 1513-A with the Act, given that the Act requires retirement board
16 members to “minimiz[e] employer contributions” and “defray[] reasonable expenses of the
17 system,” thereby considering the interests of the government employer and taxpayers as well as the
18 beneficiaries. Cal. Const., art. XVI, § 17(b); *Building Material & Construction Teamsters’ Union*
19 *v. Farrell*, 41 Cal. 3d 651, 665 (1986) (“It is also settled that when the terms of a statute or charter
20 may reasonably be interpreted to avoid conflict with a constitutional interpretation, they will be so
21 read.”). Accordingly, this claim is not ripe for review, and any determination of violation with
22 state law would be premature.

23 2. Separation of Powers

24 The SJPOA’s fifth cause of action alleges that section 1515-A of Measure B violates the
25 separation of powers provision of the California Constitution because “it gives the City Council
26 ultimate authority to decide ‘whether to determine the section severable and ineffective’ if such
27 ordinance is found to be ‘invalid, unconstitutional or otherwise unenforceable.’” (SJPOA
28 Complaint, ¶¶ 95-96, citing Cal. Const., art. III, § 3.) It asserts that Section 1515-A permits the

1 Council to decide the remedy if an ordinance it adopts pursuant to Measure B is struck down,
2 thereby usurping the authority of the judicial branch. (*Id.*, ¶ 96.)

3 This provision, however, simply notes the Council's discretion to decide how to comply
4 with an adverse judgment, and in no way usurps the judicial function. Rather, this provision is
5 consistent with separation of powers jurisprudence wherein courts generally limit their orders "to
6 requiring governmental defendants to take action in conformity with the law" rather than requiring
7 the entity "to take a particular course of action." *Common Cause v. Board of Supervisors*, 49 Cal.
8 3d 432, 445-446 (1989) ("A court seeking to remedy a violation of law should not require a
9 particular remedy unless the respective governmental entity has no discretion to exercise ... or
10 unless ... it fails to exercise that discretion after being given a reasonable opportunity to do so").
11 Here, there is no judgment in these consolidated cases, no court has ordered the City to remedy any
12 particular violation, and the City has not had the opportunity to succeed or fail in exercising any
13 discretion provided by a court. Accordingly, there is no actual controversy and it is premature to
14 determine whether the City has done anything to usurp judicial power.

15 **IV. CONCLUSION**

16 For the above-stated reasons, the City respectfully requests that the Court dismiss the
17 following causes of action with prejudice:

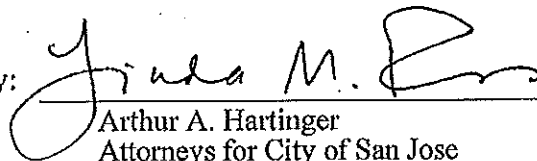
18 AFSCME's second (Bill of Attainder), fifth (Pension Protection Act), sixth (Right to
19 Petition), and seventh causes of action (Illegal Tax), and all of AFSCME's causes of action based
20 on California Civil Code 52.1, brought against both the City and City Manager Debra Figone;

21 The SJPOA's fourth (Right to Petition), fifth (Separation of Powers), and eighth causes of
22 action (Pension Protection Act), and all of the SJPOA's causes of action for violation of California
23 Civil Code section 52.1, which are brought against the City.

24 DATED: December 19, 2012

MEYERS, NAVE, RIBACK, SILVER & WILSON

25
26 By:


Arthur A. Hartinger
Attorneys for City of San Jose

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